

**A Wong Joo Sen v Public Prosecutor**

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05-40  
OF 2008 (P)

**B** RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM  
YUSOFF AND JAMES FOONG FCJJ  
27 JULY 2010

**C** *Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether mens rea possession established — Whether trial judge erred in accepting evidence of Chief Inspector — Whether there was misdirection on standard of proof by trial judge*

**D** *Evidence — Witness — Credibility of — Whether oral evidence of Chief Inspector unreliable — Whether trial judge erred basing his findings on evidence of unreliable witness*

E Acting on information received a police party led by Chief Inspector  
Munaianthy a/l Marimuthu ('the CI') raided a house situated in Pulau Pinang.  
F When the raiding party could not gain entry into a locked bedroom in the  
house, the CI and another member of his raiding team kicked the door down  
and then entered. Upon entering the room the CI saw Wong Joo Sen ('the  
appellant') running away from the bed towards an attached bathroom and  
throwing something from his right hand in the direction of the bathroom.  
G After a brief struggle in the bathroom the appellant was arrested. The police  
then carried out a search of the room and bathroom and recovered three  
translucent plastic packages from the bathroom. An examination of the three  
packages showed a total of five blue plastic packets, which each contained 200  
H pills which upon an analysis by a chemist were found to be 117.5g of  
methamphetamine a dangerous drug under the Dangerous Drugs Act 1952  
(the Act'). The appellant was charged with trafficking 117.5g of  
methamphetamine under s 39B(1)(a) of the Act. At the close of the  
I prosecution case the trial judge found that the appellant's act of throwing the  
pills when the police closed in showed that he had physical custody and the  
power to dispose of those pills; that there was no break in the chain of evidence  
as regards the handling of the drugs from recovery until analysis when they  
were found to be a type of dangerous drug; and that since the amount of drug  
found in the appellant's control exceeded the amount as prescribed under  
s 37(da) of the Act the irresistible inference was that the appellant was  
trafficking in the drug. In his defence the appellant submitted that he had no  
knowledge of the drug and that the drug found in his bathroom did not belong  
to him. It was the appellant's defence that his friend, one Ah Nam, had visited

him in his house because he was unwell and planted the drug in his room without his knowledge. The appellant only came to allegedly discover this later when his mother informed him about it, which was why he did not inform the police about it sooner. The trial judge did not find the defence having cast any reasonable doubt on the case for the prosecution and therefore convicted and sentenced the appellant to death. The appellant's appeal was dismissed by the Court of Appeal that found that the trial judge had not erred in coming to her findings on the totality of the evidence adduced. Although there was no direct evidence of trafficking, the Court of Appeal held that there was no basis to disturb the finding of the trial judge in the light of the amount of the drug found in the custody, control and possession of the appellant. This was the appellant's appeal against that decision. The appellant's thirteen grounds of appeal to this court were summarised into two main issues, namely, whether mens rea possession had been established and whether there was a misdirection on the standard of proof by the trial judge. The appellant submitted that the trial judge should have been cautious in accepting the evidence of the CI, who was unworthy of credit and whose testimony was pivotal to the case for the prosecution. The prosecution contended that the CI was a truthful and honest witness and there was no presumption that a witness of fact including an interested witness should not be believed without any cogent reason to say otherwise.

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**Held**, dismissing the appeal:

- (1) From the evidence recorded there was no basis to say that the trial judge was not careful in accepting the evidence of the CI in his narration of events leading to the recovery of the packages in the bathroom of the bedroom of the appellant. In fact there was no evidence to suggest that it was unreasonable and illogical for the trial judge to have believed and accepted wholly the testimony of the CI. The fact that the CI went to the appellant's house armed with information received and was thus interested to find out if the information was correct did not make him an unworthy witness. No evidence was adduced to show that the CI had known the appellant before and in any case the evidence of the CI was supported by the evidence of other members of the raiding party. Thus there was no merit in the issue pertaining to the reliability of the CI as a witness establishing the key elements of the offence and this was a case in which there was no need to interfere with the concurrent findings of facts of the courts below (see paras 22–24 & 33).
- (2) When this court stated that 'there must be an express affirmative finding of possession (as opposed to legal presumption), based on evidence' it meant that conduct at the time of arrest, if admitted in evidence, was crucial in determining the existence of mens rea possession under the Act. Thus, in the present case the trial judge found as being relevant the conduct of the appellant running towards the bathroom and throwing

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- A something upon the entry of the CI into his bedroom and such conduct was inferred as indicative of mens rea possession of the dangerous drug found in the bathroom. Further, from the testimony of the appellant's mother which was rightly disbelieved by the trial judge the appellant had sole control and occupation of the bedroom at the material time (see
- B paras 30–32).
- (3) The fact that the trial judge ruled that the defence had failed to cast doubt on the truth of the prosecution's case should not be taken as a misdirection. The statement that followed this comment should also be
- C taken into account and it was clear that the trial judge went on to say that the court was satisfied that the prosecution had proved the charge preferred against the appellant without any reasonable doubt. It should also be noted that the burden had moved to the appellant in this case to rebut the presumption of trafficking on a balance of probabilities. In any
- D case no miscarriage of justice had been occasioned on the usage by the trial judge of the expression complained of, so as to warrant the setting aside of the conviction (see paras 36, 38–39 & 43).

**[Bahasa Malaysia summary]**

- E Bertindak atas maklumat yang diterima, pasukan polis yang diketuai oleh Ketua Inspektor Munaiandy a/l Marimuthu ('KI') menyerbu sebuah rumah yang terletak di Pulau Pinang. Apabila pasukan serbuan tidak dapat memasuki bilik terkunci di dalam rumah tersebut, KI dan seorang lagi ahli pasukan serbuannya menendang pintu dan kemudiannya masuk. Semasa memasuki
- F bilik KI nampak perayu berlari dari katil ke arah bilik air berkembar dan membuang sesuatu daripada tangan kanannya ke arah bilik air tersebut. Selepas pergelutan kecil di dalam bilik air perayu ditangkap. Polis kemudiannya menjalankan pencarian di bilik dan bilik air dan menemui tiga bungkusan plastik lutsinar daripada bilik air. Pemeriksaan terhadap ketiga-tiga
- G bungkusan tersebut menunjukkan jumlah keseluruhan lima paket plastik biru, yang mana setiap satu mengandungi 200 pil di mana atas penganalisan oleh pakar kimia adalah didapati 117.5g dadah berbahaya methamphetamine di bawah Akta Dadah Berbahaya 1952 ('Akta'). Perayu didakwa mengedar dadah methamphetamine sebanyak 117.5g di bawah s 39B(1)(a) Akta. Di akhir kes
- H pendakwaan hakim perbicaraan mendapati bahawa tindakan perayu membuang pil-pil tersebut apabila diserbu oleh polis menunjukkan bahawa dia mempunyai kawalan fizikal dan kuasa untuk membuang pil-pil tersebut; bahawa tidak terdapat penyimpangan di dalam rantaian keterangan berkaitan pengendalian dadah sejak penemuan sehingga analisa apabila ia didapati
- I adalah jenis dadah berbahaya; dan bahawa memandangkan jumlah dadah yang didapati di dalam kawalan perayu melebihi jumlah yang ditetapkan di bawah s 37(da) Akta inferens yang tidak dapat dielakkan adalah bahawa perayu mengedar dadah tersebut. Dalam pembelaannya perayu menghujah bahawa dia tidak mempunyai pengetahuan mengenai dadah tersebut dan bahawa

dadah yang dijumpai di dalam bilik airnya bukan miliknya. Ia adalah pembelaan perayu bahawa kawannya, seorang yang bernama Ah Nam, telah melawatnya di rumahnya kerana dia sakit dan meletakkan dadah tersebut di dalam biliknya tanpa pengetahuannya. Perayu hanya menjumpainya apabila ibunya memberitahu dia mengenainya, menyebabkan dia tidak memberitahu polis secepat mungkin mengenainya. Hakim perbicaraan tidak mendapati pembelaan menimbulkan apa-apa keraguan munasabah ke atas kes untuk pendakwaan dan oleh itu menyabitkan dan menghukum perayu kepada hukuman mati. Rayuan perayu ditolak oleh Mahkamah Rayuan yang mendapati bahawa hakim perbicaraan tidak tersilap dalam mencapai dapataannya atas keseluruhan keterangan yang dikemukakan. Walaupun tidak terdapat keterangan terus pengedaran, Mahkamah Rayuan memutuskan bahawa tidak terdapat asas untuk campur tangan dapatan hakim perbicaraan berdasarkan jumlah dadah yang ditemui di dalam kawalan, jagaan dan milikan perayu. Ini adalah rayuan perayu terhadap keputusan tersebut. Ketiga-tiga belas alasan rayuan perayu kepada mahkamah ini diringkaskan kepada dua isu utama, iaitu, sama ada milikan mens rea telah dibuktikan dan sama ada terdapat salah arah atas standard pembuktian oleh hakim perbicaraan. Perayu berhujah bahawa hakim perbicaraan patut berhati-hati di dalam menerima keterangan KI, yang tidak boleh dipercayai dan testimoninya penting kepada kes pihak pendakwaan. Pihak pendakwaan berhujah bahawa KI adalah saksi benar dan jujur dan tidak terdapat anggapan bahawa saksi fakta termasuk saksi yang berkepentingan tidak patut dipercayai tanpa apa-apa alasan meyakinkan untuk menyatakan sebaliknya.

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**Diputuskan,** menolak rayuan:

- (1) Daripada keterangan yang dilaporkan tidak terdapat asas untuk menyatakan bahawa hakim perbicaraan tidak berhati-hati di dalam menerima keterangan KI di dalam penceritaannya terhadap kejadian-kejadian yang membawa kepada penemuan bungkusan-bungkusan di dalam bilik air bilik tidur perayu. Sebenarnya tidak terdapat keterangan untuk mencadangkan bahawa ia adalah tidak munasabah dan tidak logik untuk hakim perbicaraan mempercayai dan menerima keseluruhan testimoni KI. Fakta bahawa KI pergi ke rumah perayu dilengkapi dengan maklumat yang diterima dan oleh itu berminat untuk mengetahui sama ada maklumat tersebut adalah betul tidak membuatnya saksi yang tidak boleh dipercayai. Tiada keterangan yang dikemukakan untuk menunjukkan bahawa KI mengenali perayu sebelum ini dan walau bagaimanapun keterangan KI disokong oleh ahli-ahli lain pasukan serbuan tersebut. Oleh itu tidak terdapat merit dalam isu berkaitan kebolehpercayaan KI sebagai saksi untuk membuktikan unsur-unsur penting kesalahan dan ini adalah kes

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- A di mana tidak perlu campur tangan dengan dapatan serentak fakta Mahkamah Rayuan dan Mahkamah Tinggi (lihat perenggan 22–24 & 33).
- (2) Apabila mahkamah ini menyatakan bahawa ‘there must be an express affirmative finding of possession (as opposed to legal presumption), based on evidence’ ia bermaksud bahawa tingkah laku pada masa penangkapan tersebut, jika disertakan di dalam keterangan, adalah penting dalam menentukan kewujudan milikan mens rea di bawah Akta. Oleh itu, dalam kes ini hakim perbicaraan mendapati tingkah laku perayu berlari ke arah bilik air dan membuang sesuatu selepas KI memasuki bilik tidurnya sebagai perkara relevan dan tingkah laku sedemikian disimpulkan menunjukkan milikan mens rea dadah berbahaya yang dijumpai di dalam bilik air. Selanjutnya, daripada testimoni ibu perayu yang mana secara betul tidak dipercayai oleh hakim perbicaraan, perayu mempunyai satu-satunya kawalan dan penghunian bilik tidur pada masa material (lihat perenggan 30–32).
- (3) Fakta bahawa hakim perbicaraan memutuskan bahawa pihak pembelaan gagal untuk menimbulkan keraguan ke atas kebenaran kes pihak pendakwaan tidak patut dianggap sebagai salah arah. Penyataan berikutan komen ini patut juga diambil kira dan jelas bahawa hakim perbicaraan meneruskan dengan berkata bahawa mahkamah berpuashati bahawa pihak pendakwaan telah membuktikan dakwaan yang dikenakan terhadap perayu tanpa apa-apa keraguan munasabah. Ia juga patut diambil kira bahawa beban berpindah kepada perayu untuk menafikan anggapan mengedar dadah atas imbalan kebarangkalian. Walau bagaimanapun ketidakadilan tidak berlaku atas penggunaan hakim perbicaraan terhadap penyataan yang diadukan, untuk mewajarkan pengenehan sabitan tersebut (lihat perenggan 36, 38–39 & 43).]

#### G Notes

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2750–2779.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

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##### Cases referred to

*Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1, SC (refd)

*Balasingham v PP* [1959] MLJ 193 (refd)

*DP Vijandran v PP* [1999] 1 MLJ 385; [1999] 1 CLJ 691, CA (refd)

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*Mohamed Kunju v PP* [1966] 1 MLJ 271, FC (refd)

*Mohamed Yatin bin Abu Bakar v PP* [1950] MLJ 57 (refd)

*Muhammed bin Hassan v PP* [1998] 2 MLJ 273 FC (refd)

*Parlan bin Dadeh v PP* [2008] 6 MLJ 19, FC (refd)

*Tan Boon Kean v PP* [1995] 3 MLJ 514, FC (refd)

*Tan Sri Tan Hian Tsin v PP* [1979] 1 MLJ 73, FC (refd)

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*Teng Howe Sing v PP* [2009] 3 MLJ 46, FC (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 92

Dangerous Drugs Act 1952 ss 37(da), 37(da)(xvi), 39B(1)(a), 39B(2), Part III,  
First Schedule

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**Appeal from:** Criminal Appeal No P-05–73 of 2003 (Court of Appeal,  
Putrajaya)

*Karpal Singh (Ramkarpal Singh with him) (Rajit Gill & Co) for the appellant.*  
*Saiful Edris bin Hj Zainuddin (Deputy Public Prosecutor, Attorney General's  
Chambers) for the respondent.*

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**Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the  
court):**

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INTRODUCTION

[1] The appellant was convicted and sentenced to death by High Court  
Pulau Pinang on 29 July 2003 on a charge for trafficking 117.5g  
methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the  
Act') and punishable under s 39B(2) of the same Act. His appeal to the Court  
of Appeal was dismissed on 29 July 2008. He now appeals to this court.

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[2] The charge reads:

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Bahawa kamu pada 10 Mac 2001 jam lebih kurang 7.00 malam di alamat 1184,  
Jalan Satu, Mukim 6, Kepala Batas, di dalam Daerah Seberang Perai Utara, di dalam  
Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Methamphetamine  
seberat 117.5 gram, dan oleh itu kamu telah melakukan satu kesalahan di bawah  
seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah  
seksyen 39B(2) Akta yang sama.

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BACKGROUND FACTS

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[3] Acting on information received, the police party led by Chief Inspector  
Muniandy a/l Marimuthu ('PW5') raided a house at No 1184, Jalan Satu,  
Mukim 6, Kepala Batas, Seberang Perai Utara, Pulau Pinang on 10 March  
2001.

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[4] On arrival at the address the police found the gate and the front door  
open. The raiding party was divided into three teams. One team went to guard  
the rear of the house while another kept watch the front. PW5 and two others,

A Sjn Che Hasan bin Dolah ('PW6') and L/Kpl Ahmad Kushairi ('PW8') entered the open front door of the house.

B [5] Upon entry PW5 found 5 ladies in the dining area playing a game of cards. PW5 identified himself to one of the ladies. He then proceeded to a bedroom on the right at the rear portion of the house together with PW6. PW8 was directed to guard the rear exit door of the house.

C [6] PW5 knocked at the door of the bedroom and shouted 'Police, open the door' twice. There was no response. PW5 and PW6 therefore kicked the door and after the second kick managed to open it.

D [7] PW5 rushed inside the room. As he entered the room PW5 saw the appellant running away from the bed towards the front door of the attached bathroom and was throwing something from his right hand in the direction of the bathroom. PW5 proceeded to arrest the appellant with the assistance of PW6 after a brief struggle inside the bathroom.

E [8] PW5 proceeded to investigate in the bathroom and he found three translucent plastic packages. Later upon examination of the packages in his office in the presence of the appellant PW5 found that there were 6000 pills in the three packages with the initials 'WY' stamped at the back of each pill. Each package was measured 4" x 3" in size containing two bundles of five blue plastic packets. The bundles were bound together by a rubber band. In each of the five  
F blue plastic packets contained 200 pills. There were 30 blue plastic packets altogether.

G [9] The packages together with pills recovered were sent to the chemistry department for analysis. The chemist, Puan Elliza bt Mat Nor ('PW3'), did the analysis and found the pills to be methamphetamine with a net weight of 117.5g, a dangerous drug listed in Part III of the First Schedule of the Act.

#### FINDINGS OF THE TRIAL HIGH COURT

H [10] On the issue of custody, control and possession of the dangerous drug in question the learned trial judge, without relying on the statutory presumption on possession, ruled:

- I (a) that the action of throwing the translucent plastic packages indicated that the appellant had the custody and control of the pills since the packages were held by him in his hand before throwing them away;
- (b) that the act of throwing the pills showed that the appellant had the physical custody and the power to dispose of those pills; and

(c) that the act of not opening the door despite the shouts of PW5 and the subsequent struggle with PW5 and PW6 indicated that the appellant knew that the translucent plastic packages containing the 6,000 'WY' pills were methamphetamine a type of dangerous drug. A

[11] The learned trial judge did not find any break in the chain of evidence as regards the handling of the recovered drug from its recovery until the analysis by the chemist, PW3. And that the chemist had analysed it and found it to be a type of dangerous drug as defined under the Act. B

[12] In respect of the presumption of trafficking under s 37(da)(xvi) of the Act the learned trial judge held that the drug found with the appellant not only had exceeded the amount as prescribed under the presumption but that the quantity was such that the irresistible inference was that the appellant had the drug for the purpose of trafficking, that is, for sale or supply to others. The burden had therefore shifted to the appellant to rebut on the balance of probabilities. C D

[13] In his defence the appellant testified:

- (a) that he had no knowledge of the drug; E
- (b) that the drug did not belong to him;
- (c) that the drug was in fact planted in the toilet by his friend Ah Nam; and F
- (d) that he did not inform the police about Ah Nam planting the drug in his room as he came to know of it after his mother Chuah Siok Tee ('DW2') informed him.

[14] DW2 testified that on 10 March 2001 at about 1pm, Ah Nam came to the house looking for the appellant. However the appellant was not well so Ah Nam left. At about 5pm on the same day Ah Nam returned to the house carrying a plastic bag in his hand. After DW2 had informed him that the appellant was still sleeping, he retrieved a key to the appellant's bedroom from a table and went inside. When Ah Nam came out of the room he did not carry anything with him. G H

[15] The learned trial judge did not believe the version of the defence including the evidence of DW2 and did not find the defence having cast any reasonable doubt on the case for the prosecution. The appellant was therefore I

A convicted and sentenced for the offence as charged.

BEFORE THE COURT OF APPEAL

B [16] The appellant appealed to the Court of Appeal. His appeal was dismissed. The Court of Appeal held:

- (a) that the learned trial judge did not err in coming to her findings on the totality of the evidence adduced;
- C (b) that it had no reason to disturb the findings of the learned trial judge that the appellant had exclusive care and occupation of the room in which he was arrested since there was no one else who had access into the said room;
- D (c) that the learned trial judge had in her mind the legal principles on the issue of possession and the physical and mental elements necessary to constitute mens rea possession of the dangerous drug;
- E (d) that on the factual matrix of this case there was no necessity to rely on the statutory presumptions under the Act to establish possession of the dangerous drug by the appellant;
- (e) that while there was no direct evidence of trafficking, there was no basis to disturb the finding of the learned trial judge that the appellant was trafficking in the dangerous drug because:
  - F (i) the amount of drug found with the appellant exceeded twice the amount which attracted the invocation of the presumption of trafficking under s 37(da)(xvi) of the Act;
  - G (ii) the appellant did not lead any evidence that he was a drug addict, hence the issue of him in possession of the drug for his own consumption did not arise in rebuttal of the statutory presumption of trafficking under s 37(da)(xvi) of the Act; and
  - H (iii) that taking into consideration the large quantity of pills (6,000) in the three packages recovered and the manner in which they were packed, that is, in 30 small blue plastic packets, each containing 200 pills, irresistibly led to an inference that the drug were intended for distribution loosely or in packets (by sale or otherwise) to third parties known or unknown to the appellant if not for the seizure by the police; and
  - I (f) that the conclusion of the learned trial judge was correct in that the appellant and DW2 could not be believed as to the existence and the role played by a person called Ah Nam. It could not be believed that DW2 did not even bother to stop or protest the alleged Ah Nam from entering the

bedroom of the appellant unimpeded.

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BEFORE THIS COURT

[17] There are 13 grounds of appeal submitted in the petition of appeal. However, learned counsel for the appellant in his submission summarised the grounds into two main issues, namely:

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- (a) on the reliability of the evidence of PW5 and whether mens rea possession had been established; and
- (b) there was misdirection on the standard of proof by the learned trial judge.

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[18] On the issue of reliability of PW5 it was submitted by learned counsel for the appellant, inter alia:

- (a) that the learned trial judge should have been cautious in accepting the evidence of PW5 since his testimony was pivotal to the case for the prosecution;
- (b) that it should have been considered that what was recovered in the bathroom was the consequence of information received earlier on;
- (c) that PW5 was unworthy of credit; and
- (d) notwithstanding that there were concurrent findings of facts by the trial court and the Court of Appeal, this court could depart from such finding on the authority of *DP Vijandran v Public Prosecutor* [1999] 1 MLJ 385 at p 413; [1999] 1 CLJ 691 at p 695. In that case the Court of Appeal agreed that it is the settled practice 'of this court not to interfere with concurrent findings of fact save in very rare cases. If, for instance, it could be shown that the course of events affirmed by the trial judge could not have occurred, that would be a good reason for reversing his view. See, *The 'Eurymedon'* (1942) 73 Ll L Rep 217; *Tara Singh v Public Prosecutor* [1954] MLJ 123; [1954] 1 LNS 113; *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; [1974] 1 LNS 176'.

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[19] In reply learned deputy public prosecutor contended that PW5 was found by the learned trial judge to be a truthful and honest witness. Further there is no presumption that a witness of fact including an interested witness should not be believed without any cogent reason to say otherwise. The case of *Balasingham v Public Prosecutor* [1959] MLJ 193 was cited in support.

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[20] In her judgment the learned trial judge considered the overall evidence adduced including that of the defence before coming to her final conclusion on the guilt or innocence of the appellant. Each of the elements for the offence as charged was considered based on the evidence adduced.

A [21] For instance on the element of possession of the dangerous drug the learned trial judge was very careful when considering the events, including the evidence of PW5, leading to the finding of the packages in the bathroom of the bedroom of the appellant. The Court of Appeal was therefore correct to conclude that in this case 'on the factual matrix, there was no necessity to rely on any statutory presumptions under the Act to establish possession of the drugs' by the appellant.

C [22] Thus, from the evidence recorded we find no basis to say that the learned trial judge was not careful and too readily to accept the evidence of PW5 in his narration of the events leading to the recovery of the packages in the bathroom of the bedroom of the appellant. In fact there was no evidence to suggest that it was unreasonable and illogical for the learned trial judge to have believed and accepted wholly the testimony of PW5. As such we do not think this is a case in which we should interfere with the concurrent findings of facts of the courts below.

E [23] No doubt PW5 went to the house of the appellant armed with information received and was thus interested to find out if the information was correct. However that should not necessarily make him an untrustworthy witness (see *Balasingham v Public Prosecutor*). It should be noted that PW5 went to the house with other police personnel. There was nothing adduced to show the slightest indication that PW5 had a reason to accuse the appellant of any offence. There was also no evidence adduced to show that PW5 had known the appellant before.

G [24] Thus we find no merit in the issue pertaining to the reliability of PW5 as a witness establishing the key elements of the offence as charged. It should also be noted that the evidence of PW5 was supported by the evidence of other witnesses such as PW1, PW2, PW4, PW6, PW7, PW8 and PW10.

H [25] It was next submitted that in coming to her conclusion on the issue of mens rea possession the learned trial judge erred in merely accepting that the act of the appellant in running to the bathroom and throwing something as being a conduct or an overt act indicative of knowledge. We are therefore urged to consider the cases of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 and *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 in relation to the point on overt act or conduct, knowledge and possession and the legal implications thereof under the Act.

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[26] In *Parlan bin Dadeh* case this court said this at pp 40–42 and 44–46: A

Evidence of conduct is admissible under s 8 of the Evidence Act 1950 ('s 8') which reads as follows:

- (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. B
- (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. C

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Evidence of conduct admissible under s 8 may be explained as provided in s 9 of the Evidence Act 1950 ('s 9') which reads as follows: D

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose. E

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The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v Stephenson* (1904) 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. Illustration (c) to s 9 explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the F  
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- A business on which he left, however, are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.
- B It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *Director of Public Prosecutions v Brooks* the accused was in the driver's seat of a stationary van with several others.
- C There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi bin Yusoff* there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff* is therefore authority only to this extent. On the other hand in *Director of Public Prosecutions v Brooks* there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s 9.
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- G In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *Director of Public Prosecutions v Brooks*). It follows that the stand taken by the appellant in relation to the evidence of conduct is not sustainable. Be that as it may, the evidence of conduct in this case is not very significant in view of the manner in which the appellant carried the drugs on his person from which it can reasonably be inferred that he had knowledge of the drugs in his possession (see the cases referred to earlier, and, in particular, *Tunde Apatina & Ors v Public Prosecutor* [2001] 1 MLJ 259 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1).
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[27] It was thus submitted that in considering the issue of mens rea possession in *Parlan bin Dadeh* case this court did not take into account the view expressed by this court on the same issue in *Muhammed bin Hassan v Public Prosecutor*. In that case this court said this at pp 285, 288–289 and 291–292:

In other words, it was the contention for the appellant that in order to invoke s 37(da), there must be an actual finding of possession as opposed to ‘deemed’ possession; otherwise there would be one presumption upon another presumption, which was not what the two subsections permitted. As persuasive authorities, reference were made to ss 17 and 18(1) and (2) of the Misuse of Drugs Act (Cap 185) of Singapore, Revised Edition 1997 (‘the Singapore Act’) and the Singapore case of *Low Kok Wai v Public Prosecutor* [1994] 1 SLR 676.

...

In our view, there is a clear undeniable distinction between the word ‘deemed’ used in s 37(d) and the word ‘found’ employed in s 37(da) of the Act. The ‘deemed’ state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as ‘compelling presumptions’ in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word ‘found’ in the opening phrase of s 37(da) connotes a finding after a trial by the court.

Furthermore, the basic or primary facts needed to raise ‘deemed’ possession and ‘deemed’ knowledge under s 37(d) of the Act and those required to raise ‘presumed ... trafficking’ under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had ‘in custody or under ... control anything whatsoever containing’ the drug (as opposed to the drug itself) whereas to arrive at the presumption of ‘trafficking’ under s 37(da), a finding of being ‘in possession’ of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute ‘possession’ under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

...

A Having considered the submissions of counsel and the learned deputy public prosecutor, and the law applicable including the rules of construction of penal statutes, we were of the view that the word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s 37(d).

B In our view, on the wording of s 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as a general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This depends on the construction of the particular legislation. But a court should be extremely cautious and slow to infer from a statute that Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in the criminal calendar. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.

E We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

G [28] Foremost, it should be appreciated that *Muhammed Hassan* case was primarily dealing with the question of whether it should be permitted to invoke both the presumptions of possession and trafficking under the Act to find the guilt of an accused. And this court in that case opined that 'to constitute possession under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence'.

I [29] Whereas in *Parlan bin Dadeh* case this court was more concerned with the admissibility of conduct of an accused person at the time his arrest in relation to proof of the element of possession under the Act. As such it is quite understandable why this court did not make any direct reference to *Muhammed Hassan* case in *Parlan bin Dadeh* case.

[30] And although this court stated that 'there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in

criminal law, based on evidence' it should not be understood that such statement excludes and makes it irrelevant any conduct of an accused at the time of his arrest. Conduct at the time of arrest, if admitted in evidence as discussed in *Parlan bin Dadeh* case, is crucial in determining the existence of mens rea possession under the Act. In other words, conduct at the time of arrest or an overt act is of evidential value and fact sensitive. However, it should not be said that invariably an overt act equals to knowledge.

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[31] Thus, in the present case the learned trial judge found as being relevant and thus admitted the conduct of the appellant of running towards the bathroom and throwing something upon the entry of PW5 into his bedroom. And there being no plausible explanation given by the appellant or other probable inference based on the evidence adduced as a whole (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1) such conduct was taken or inferred by the learned trial judge as indicative of mens rea possession of the dangerous drug found in the bathroom.

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[32] The version of DW2 was also rightly disbelieved by the learned trial judge. In our view it was not a plausible explanation on the conduct of the appellant upon entry by PW5 into the bedroom. DW2, the mother of the appellant testified that a person known to her as Ah Nam had earlier on entered the bedroom of the appellant opening the door with a key from a table. Ah Nam was alleged to have carried a plastic bag into the bedroom and leaving without it. DW2 did not say whether Ah Nam locked the bedroom when he left or it was kept unlocked. In any event the fact is that the door was locked. And if indeed there was a key used by the alleged Ah Nam DW2 could have told PW5 to use the same key to open the bedroom instead of PW5 and PW6 having to kick the door twice to open it. Further, other than the alleged Ah Nam having entered the bedroom of the appellant there was no other assertion that it was accessed by any third party. In other words, the appellant had the sole control and occupation of the bedroom at the material time.

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[33] There is therefore no merit in the submission by learned counsel for the appellant that this present case is at most one of possession similar to *Muhammed Hassan* case.

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[34] We would say that based on the evidence adduced this case is more consistent with the earlier cases decided by this court such as *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46 in which the conduct of the accused involved the throwing away of the incriminating object in the hope of dissociating oneself from it was taken or inference made for knowledge on the element of possession under the Act.

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A [35] In respect of the second issue raised, it was asserted that there was misdirection committed by the learned trial judge when she said this at p 485 of the appeal record:

B Mahkamah berpuashati bahawa pembelaan telah gagal menimbulkan satu keraguan yang munasabah dalam kebenaran kes pihak pendakwaan. Mahkamah berpuashati bahawa pihak pendakwaan telah membuktikan pertuduhan terhadap tertuduh tanpa sebarang keraguan munasabah. Tertuduh adalah didapati bersalah kerana telah melakukan kesalahan mengedar dadah berbahaya iaitu methamphetamine seberat 117.5 gram di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952.

C [36] According to learned counsel for the appellant it was misdirection when the learned trial judge ruled that the defence failed to cast doubt on the truth of the prosecution's case.

D [37] In response learned deputy public prosecutor contended that since s 37(da) of the Act was involved the appellant had a higher burden to prove, namely, on the balance of probabilities, to rebut the presumption for trafficking. It was also urged that s 92 of the Courts of Judicature Act 1964 should be invoked since there was no miscarriage of justice as to warrant the setting aside of the conviction of the appellant.

F [38] In our view despite what the learned trial judge ruled the statement that followed it should be taken into account. It is clear that the learned trial judge went on to say that the court was satisfied that the prosecution had proved the charge preferred against the appellant without any reasonable doubt. It should also be noted in this case that the burden is on the appellant to rebut the presumption of trafficking on the balance of probabilities.

G [39] Anyway, the expression 'as to the truth of the prosecution case' is quite commonly used by judges in relation to a question: 'Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt?' (see *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514). Such usage should hardly be objectionable or taken as misdirection. It does not demand a heavier burden on the defence.

H [40] For instance, in *Tan Sri Tan Hian Tsin v Public Prosecutor* [1979] 1 MLJ 73 Chang Min Tat FJ said this at p 78:

I It is obvious that to the learned judge the defence had cast no doubt as to the truth of the prosecution case, even given the premise of the debt to Hwa Chiang which he assumed.

In *Mohamed Kunju v Public Prosecutor* [1966] 1 MLJ 271 Azlan Shah J (as he then was) ruled thus at p 274:

Having regard to the case as a whole, I was satisfied that the defence had not raised a reasonable doubt as to the truth of the prosecution case or as to the accused's own guilt. I therefore found him guilty and convicted him.

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And in *Mohamed Yatin bin Abu Bakar v Public Prosecutor* [1950] MLJ 57 Spenser-Wilkinson J at p 59 explained:

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In an ordinary case, where no special burden of proof or explanation is by law cast upon the accused, his position is more favourable than it is in those cases where the law presumes something against him. The principle laid down in the recent English cases, particularly *Mancini v Director of Public Prosecutions* [1942] AC 1 appears to me to be that, where no special onus is cast by law upon the accused, then, if his story has the effect of raising a reasonable doubt as to the truth of the prosecution case, he is entitled to an acquittal; and this is the 'ordinary rule' which is referred to in the passage above quoted from *R v Garth* (1949) 33 Cr App R 100. In this country, at the close of the case for the prosecution the court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but whether, even if the court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt.

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[43] Hence, on the second issue raised we find no merit in it. We are also inclined to agree with the learned deputy public prosecutor that no miscarriage of justice has been occasioned on the usage by the learned trial judge of the expression complained of so as to warrant the setting aside of the conviction.

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[44] In any event the present case is substantially factual and being an appellate court we should be slow in interfering with the findings of facts by the learned trial judge.

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#### CONCLUSION

[45] Accordingly and for the reasons hereinabove we dismiss this appeal. The conviction as found and the sentence passed by the trial court are hereby affirmed.

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*Appeal dismissed.*

Reported by Kohila Nesan

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